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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 270

BLACKHAWK-PERRY CORPORATION, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 22-28) are not reported. The opinion of the Court of Appeals (R. 39-44) is reported at 182 F. 2d 319.

JURISDICTION

The judgment of the Court of Appeals was entered May 31, 1950. (R. 45.) The petition for a writ of certiorari was filed August 25, 1950. The

jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the taxpayer is required by Section 113(b)(1)(B) of the Internal Revenue Code to adjust its depreciation basis in the taxable years by deducting amounts of prior depreciation allowances claimed in tax returns for earlier years which were accepted by the Commissioner.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 9-13.

STATEMENT

The facts with respect to the only issue here involved were stipulated (R. 18-21), and were found by the Tax Court (R. 22-24) as follows:

The taxpayer is a corporation organized under the laws of Delaware and doing business in Iowa. It was incorporated for the purpose of taking title to properties known as the Blackhawk Hotel and the Perry Apartments, both located in Davenport, Iowa, together with furnishings and equipment previously mortgaged by deed of trust by Blackhawk Hotels Company to secure an outstanding bond issue of $1,497,500. At the time there were pending proceedings under Section 77B of the Bankruptcy Act, and a plan of reorganization was approved by the court under which title to the

Blackhawk Hotel and the Perry Apartments, together with the contents thereof, were conveyed by the debtor Blackhawk Hotels Company to the taxpayer Blackhawk-Perry Corporation. The property so conveyed comprised the major part of the security conveyed by the deed of trust. The property covered by the deed of trust, but not conveyed to the taxpayer, consisted of several leasehold estates on hotel properties, together with their equipment. This property was transferred to the lessors in pursuance of landlords' liens. (R. 22-23.)

Under the plan of reorganization each holder of outstanding bonds of Blackhawk Hotels Company was entitled to receive, upon surrender of his bonds, shares of the capital stock of the taxpayer at the rate of one share of stock for each $100 principal amount of bonds. (R. 23.) The taxpayer requested of the debtor corporation a statement of the net book value of the equipment and furnishings of the various properties. The net book values so furnished were scaled to the actual amount of the bonds theretofore issued and outstanding, i.e., $1,497,500. (R. 23.)

The basis to the taxpayer established pursuant to the closing entries furnished by the comptroller of transferor, Blackhawk Hotels Company, for furnishings and equipment, was $215,672.67. The taxpayer ascribed to the personal property a useful life of 15 years and set forth such a rate on its return. From August 1, 1935, to and including December 31, 1944, the taxpayer computed its de-

preciation at the rate of $14,378.18 per annum (R. 23-24).

This was an erroneous basis. (R. 24.) The Commissioner, in computing the basis for depreciation, correctly adjusted the basis of the taxpayer to the basis in the hands of the transferor, Blackhawk Hotels Company, and thus established a basis of $66,625.56 for the personal property. (R. 24.)

After examination of the taxpayer's books and tax reports, deficiencies were asserted by the Commissioner in the amount of $8,627.89 for the year 1942, $11,630.92 for the year 1943, and $9,038.45 for the year 1944. The deficiencies resulted in part for the years 1942 and 1943, and entirely for the year 1944, from adjustments made by the Commissioner in the disallowance of depreciation on the personal property referred to above. (R. 24.)

As against the adjusted basis of $66,625.56 the Commissioner charged the amount of depreciation deducted by the taxpayer in its returns for the years following August 1935. As a consequence the Commissioner disallowed further depreciation for the years 1942 to 1944, inclusive, the period involved herein with resultant increase in the taxpayer's tax liability. No tax benefit accrued in any year to the taxpayer and its returns were accepted as filed by the Commissioner for the years barred by the statute of limitations. (R. 24.)

The Tax Court sustained the Commissioner's determination in respect of the issue thus presented

(R. 25-26), and the Court of Appeals affirmed the Tax Court's decision (R. 44).

ARGUMENT

Both the Tax Court (R. 25-26) and the Court of Appeals (R. 44) correctly held that this case was governed by *Virginian Hotel Co.* v. *Helvering,* 319 U.S. 523, rehearing denied, 320 U.S. 810. The taxpayer's only contention (Pet. 7-8) is that the latter case is inapplicable because the Commissioner is estopped to invoke its principles here. To be sure, the taxpayer (Pet. 8) disavows any intention to claim such estoppel; but that is what its contention amounts to in essence, and so the Court of Appeals regarded it, holding it to be without merit (R. 44). We submit its decision in this respect is not only correct, but in the absence of a conflict presents no justification for further review. The case turns upon its own particular facts and involves no questions of law having general importance.

The taxpayer acquired the property in question in a Section 77B proceeding. In view of the holdings in *Helvering* v. *Limestone Co.,* 315 U.S. 179, and *Palm Springs Corp.* v. *Commissioner,* 315 U.S. 185, it was stipulated that the correct basis for depreciation of the property in the hands of the taxpayer was the same as the adjusted basis in the hands of its transferor, namely, $66,625.56. The stipulation therefore removed from the case any question as to the proper basis for the computation of depreciation allowances to which the taxpayer

was entitled under Section 114(a) of the Internal Revenue Code, Appendix, *infra,* p. 10.

However, instead of computing its deductions for depreciation on such basis, the taxpayer computed them on the basis of its own cost of the property, namely, $215,672.67. Thus the aggregate of the deductions which it claimed in years prior to the taxable years here in question, which were accepted by the Commissioner as claimed (R. 21), exceeded its statutory basis, though without tax benefit (R. 20-21).

Section 114(a) provides, among other things, that the basis upon which exhaustion, wear and tear shall be allowed in respect of any property shall be adjusted as provided in Section 113(b). Thus the only question which the stipulation left in controversy was with respect to the adjustments properly to be made to such basis under Section 113(b)(1)(B), Appendix, *infra,* pp. 9-10. This section requires that proper adjustment shall be made for periods prior to the taxable years for exhaustion, wear and tear of the property to the extent allowed; and under the interpretation placed upon that section in the *Virginian Hotel Co.* case, *supra,* such amount is that claimed by the taxpayer and not challenged by the Commissioner, including any part thereof for which the taxpayer, as here, may have received no tax benefit.

The taxpayer's contention here (Pet. 6-7) is that, in accordance with erroneous Regulations

current in years prior to the decisions of this Court in the *Limestone Co.* and *Palm Springs Corp.* cases, *supra,* the Commissioner required it to adopt its cost as its basis and not its transferor's adjusted basis; hence, it argues (Pet. 8), the Commissioner may not correct the situation in part by retroactively adjusting the taxpayer's basis to the correct amount and denying it the concomitant benefit of revising the depreciation to be computed thereon.

But such contention is tantamount to saying that the alleged action of the Commissioner in originally requiring the taxpayer by erroneous Regulations to take its own cost as a basis for depreciation, instead of its transferor's adjusted basis, renders the provisions of Section 113(b)(1)(B) as construed by this Court inapplicable; in other words, that such action estops the Commissioner from enforcing the section against it. There is no basis for such estoppel in the present case. There is no evidence in the record that the Commissioner, in effect, or at all, required the taxpayer to compute its depreciation allowance upon an erroneous basis. There is nothing to show that the Commissioner's attention was at any time prior to his consideration of the taxpayer's returns for the taxable years here in question specifically directed to the error which the taxpayer had made in computing its basis for depreciation. On the contrary, upon the record here, it would be as consistent to conclude that the taxpayer's erroneous use of its cost as the basis was dictated by the fact

that such cost was larger than its transferor's basis, as it would be to conclude that its action was motivated by the necessity of complying with the Regulations. During all the period in question other taxpayers were attacking the Regulations when it was to their advantage to do so, and such attack, of course, ultimately proved successful in the *Limestone Co.* and *Palm Springs Corp.* cases, *supra.*

CONCLUSION

The decision of the court below rests on the particular facts of the case, is plainly correct, and presents no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER, 1950

APPENDIX

Internal Revenue Code:

SEC. 23 [As amended by Sec. 121(c), Revenue Act of 1942, c. 619, 56 Stat. 798]. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(l) *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or * * *.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

* * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) *General rule.*—Proper adjustment in respect of the property shall in all cases be made—

* * * * *

(B) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws.

* * * * *

(26 U.S.C. 1946 ed., Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for Depreciation.*—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113(b) for the purpose of determining the gain upon the sale or other disposition of such property.

* * * * *

(26 U.S.C. 1946 ed., Sec. 114.)

Revenue Act of 1943, c. 63, 58 Stat. 21:

SEC. 121. REORGANIZATION OF CERTAIN INSOLVENT CORPORATIONS.

(a) *Nonrecognition of Gain or Loss on Certain Reorganizations.*—Section 112(b) (relating to recognition of gain or loss upon certain exchanges) is amended by inserting at the end thereof the following:

"(10) *Gain or loss not recognized on reorganization of corporations in certain receivership and bankruptcy proceedings.*—No gain or loss shall be recognized if property of a corporation (other than a railroad corporation, as defined in section 77m of the National Bankruptcy Act, as amended) is transferred, in a taxable year of such corporation beginning after December 31, 1933, in pursuance of an order of the court having jurisdiction of such corporation—

"(A) in a receivership, foreclosure, or similar proceeding, or

"(B) in a proceeding under section 77B or Chapter X of the National Bankruptcy Act, as amended,

to another corporation organized or made use of to effectuate a plan of reorganization approved by the court in such proceeding, in exchange solely for stock or securities in such other corporation."

* * * * *

(c) *Basis.*—Section 113(a) (relating to basis of property) is amended—

* * * * *

(3) by inserting after paragraph (21) the following:

"(22) *Property acquired on reorganization of certain corporations.*—If the prop-

erty was acquired by a corporation upon a transfer to which section 112(b)(10), or so much of section 112(d) or (e) as relates to section 112(b)(10), is applicable, then, notwithstanding the provisions of section 270 of the National Bankruptcy Act, as amended, the basis in the hands of the acquiring corporation shall be the same as it would be in the hands of the corporation whose property was so acquired, increased in the amount of gain recognized to the corporation whose property was so acquired under the law applicable to the year in which the acquisition occurred, and such basis shall not be adjusted under subsection (b)(3) by reason of a discharge of indebtedness pursuant to the plan of reorganization under which such transfer was made."

* * * * *

(e) *Effective Date.*—Provisions having the effect of the amendments made by subsection (a), subsection (c)(3), and subsection (d)(2), (3), (4), (5), and (6), shall be deemed to be included in the revenue laws respectively applicable to taxable years beginning after December 31, 1933, but shall not affect any tax liability for any taxable year beginning prior to January 1, 1943. Provisions having the effect of the amendments made by subsection (b), subsection (c)(1) and (2), and subsection (d)(1), shall be deemed

to be included in the revenue laws respectively applicable to taxable years beginning after December 31, 1931.

(26 U.S.C. 1946 ed., Secs. 112, 113.)

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